United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

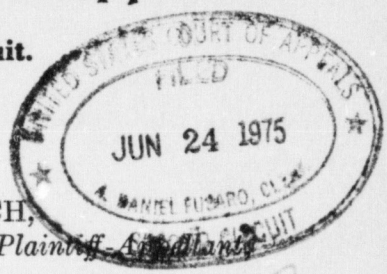
75-7242

ORIGINAL

To be argued by Seymour Simon.

United States Court of Appeals

For the Second Circuit.



PETER ROSENBRUCH,
Plaintiff-Appellant,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFF-APPELLANT.

GRAHAM & SIMON, P. C.,
Attorneys for Plaintiff-Appellant,
150 Broadway,
New York, N. Y. 10038

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 7[illegible]-6978—1975

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Issues.

The issues on this appeal are:

1. Within the purview of Section 4(5) of COGSA enacted in 1936, did the legislators intend the term "package" to mean the ordinary disposable packages belonging to the shipper in which the goods were packed as an integral part of the goods, or, a forty foot long reusable metal container belonging to the steamship company and temporarily supplied to the shipper for pre-stowage of his packages therein as a necessary adjunct of the carrier's containership operations?

2. Was the steamship company guilty of a deviation in stowing Rosenbruch's shipment on the weather deck of its vessel despite a clean bill of lading, and was it an illegal discrimination, thus depriving the carrier of any package limitation whatsoever?

3. Are the basic assumptions inferentially underlying the two orders of the lower court contradictory? Can the carrier's forty foot metal container constitute at the same time both a package of goods and an extension of the ship itself so that it is not a deviation to stow the container on the weather deck of the ship?

Statement.

This is an action in admiralty to recover the sum of $102,917.08 representing the value of Rosenbruch's (plaintiff-appellant) shipment of household goods and effects stowed in a forty foot long metal container belonging to the steamship company (defendant-appellee) and lost overboard from the deck of its vessel during common carriage by sea from New York to Hamburg. This appeal is from a judgment entered after a motion for partial summary judgment limiting Rosenbruch's recovery to $500 on the ground the shipowner's container, and not the packages stowed inside, was a "package" within the purview of Section 4(5) of COGSA.

The circumstances and course of proceedings below were quite extraordinary, requiring detailed explanation. After the answer to the complaint was filed, Judge Tyler, on the basis of his own decision and philosophy in *Royal Typewriter*, directed the steamship company at an informal pretrial conference in chambers to file a motion for summary judgment limiting Rosenbruch's recovery to $500, with the clear understanding that the motion would be granted and the case thus disposed of by him. As expected, after the motion was made, the lower court granted it solely on a perfunctory amorphous moving affidavit of the attorney for the steamship company.

Having prejudged the outcome, the lower court completely overlooked the overriding issue of "deviation"

urged in the affidavit submitted in opposition to the motion and as a cross-motion for summary judgment in his favor. This issue was also expatiated as the sole subject of Point I and in the conclusion of the brief in opposition; the package issue was marked "Point II." Further, the deviation was alleged in the complaint (19a, pars. 6, 7 8).

When the initial opinion and order of Judge Tyler was filed on March 15, 1973 (officially reported at 357 F. Supp 982 [1973]), Rosenbruch's attorney advised the judge of the oversight. As a result, on March 23, 1973, a subsequent charade-like oral argument on this issue was held, and the lower court at that proceeding requested the steamship company's attorney to prepare an order for his signature disposing of the deviation issue. This order was signed as submitted on March 27, 1973, and filed on March 28, 1973. It was not officially reported.

Since the motion and orders were not in final form to appeal to this court as of right, Rosenbruch requested a certification from the lower court under 28 U. S. C. 1292 (4) (b) for a petition to appeal under Rule 5. However, Judge Tyler decided instead to hold the entire litigation in suspense until the *Royal Typewriter* and other container appeals pending before this court were determined.

Finally, on the eve of Judge Tyler's resigning from the bench, in order to permit this appeal, the parties stipulated for, and a final judgment was accordingly entered based on the aforesaid orders. The parties further stipulated between themselves that in the event of a reversal of the lower court by this court, settlement will be made in the amount of $35,000, that being the approximate percentage settlement made by the steamship company with the owners of the goods stowed in the 31 other containers which were lost overboard and with whom the

container/package limitation was not raised by the steamship company.

Facts.

The facts are not in dispute. For convenience, they will be listed herein separately in accordance with the two issues involved (from opposing affidavit—32a-43a—except where otherwise indicated).

Container/package issue under Section 4(5).

Rosenbruch (plaintiff-appellant) engaged the 7 Santini Brothers International Inc. (and its affiliate Santini Brothers, Inc.) to export pack his household goods and effects and to arrange for their transfer by sea from New York to Germany. Their invoice, Exhibit 3 annexed to Rosenbruch's affidavit (43a), indicated that the packers used 129 packages in packing the goods "for export." The steamship company (defendant-appellee) admits the goods were packed for export, in these words: "There can be no doubt that the goods were packed for export in the container as Mr. Simon's Exhibit 3 confirms" (44a).

Subsequently, Santini Brothers made arrangements with the steamship company to transport the shipment by sea from New York to Hamburg on its container vessel the Container Forwarder, which carried only containers. In conjunction therewith, the steamship company supplied its own 40 foot permanent metal container #183333 to the forwarder for pre-stowing the shipment, and allowed them the regular 10% discount off the conventional freight charges to compensate for the fact the steamship company was able, by means of the container, to shift the labor cost of stowing the packages from itself to the shipper—in addition to the many other labor econo-

mies in handling cargo resulting from the use of the said container.

The only container case which has been litigated and in which any testimony whatsoever was offered as to the true function and use of the carrier's containers within the context of the containerization concept is *Leathers Best v. Mormaclynx,* 451 F. 2d 800 (1971). This court in footnote 19 at page 815 described the container function briefly in these words:

> "The shipper here received a discount of 10% from the otherwise applicable tariff for services in loading and unloading the container. However, there is nothing to show that the carrier did not realize corresponding economic advantages for the container method of shipment; to the contrary, the district court was of the view that containers are 'primarily for the convenience of the carrier, since they cut down handling time and can save as much as 90% of the time required for unloading and reloading a vessel.' 313 F. Supp. at 1376."

After Santini Brothers stowed Rosenbruch's household goods and effects in the steamship company's metal container for the ocean voyage, they brought it to the pier for transportation, and received back a signed dock receipt. Previously, printed forms of dock receipts and bills of lading had been supplied to the Santini Brothers in order that they may fill in the particulars of the shipment. The dock receipt when signed and returned to the trucker acts as a receipt for the shipment at the dock. The filled in bill of lading form is taken by the steamship company and, subsequently, signed, dated, numbered and returned to the shipper at a later date, presumably by mail.

Exhibits 2 (a) (b) (c) (39a, 41a) annexed to Rosenbruch's opposing affidavit indicate (to some extent) by

means of photographs the nature and function of typical containers. These photos are copies of clippings from a *New York Times* advertisement referred to in *Standard Electrica v. Hamburg,* 375 F. 2d 943, note 4.

Exhibit 2(a) demonstrates how a carrier's 40 foot metal container serves as the trailer part of a tractor-trailer rig after it is placed on a four-wheel chassis and hooked up to a tractor.

Exhibit 2(b) demonstrates how a steamship company under its containerization program avoids the expense of conventional manual loading and stowing individual packages by simply transferring the entire loaded container from the chassis which is brought alongside the ship into the ship's specially built container cells in one movement by a crane. (Before containerization, individual packages were manually received at the steamship company's pier, placed into a shed individually or in small lots, and, when the vessel was ready for loading, subsequently, the packages were manually and in small lots transferred to the stringpiece alongside the ship, then placed in cargo slings in small lots or individually and lowered into the ship's hold. After the packages are removed from the slings, they are stacked on dunnage which is laid on the deck of the ship and then the packages are fenced and braced with lumber to prevent movement during the voyage as the ship rolls and pitches.)

Exhibit 2(c) shows the inescapable difference in function and appearance between a metal sea container and a true package of goods stowed inside.

The steamship company, in preparing its printed form of bill of lading (Exhibit A attached to its moving affidavit) (29a), made no provision in the bill of lading for the shipper to state the number of packages stowed

within the container when the packages are containerized. On the contrary, the steamship company's form simply requests the shipper to show *either* the number of containers (where the goods are containerized) *or* the number of packages (where they are not).

The steamship company's tariffs do not provide for varying freight rates depending on whether the number of packages is shown in the bill of lading or not nor do its freight rates depend on the number of packages shown in the bill of lading. Not only was the steamship company not prejudiced in any way by the fact that the number of packages stowed in the container was not shown on the bill of lading but, actually, the steamship company refused to acknowledge that the number of packages stowed within a container has any legal significance whatsoever. Clause 6 of its bill of lading provides: "* * * This bill of lading is a receipt only for the number of containers * * *."

There is some doubt as to whether the container was sealed, inasmuch as the seal number was not shown in the column on the bill of lading (Exhibit A in the moving affidavit). In any event, the tariffs of the North Atlantic Conference, a cartel of steamship companies, of which the appellee is a member, provide in Tariff 13L(a) dated June 15, 1972, attached to the steamship company's reply affidavit as Exhibit A, that "its member lines reserve the right to open and inspect the contents of a container" (49a).

The steamship company lost its container and Rosenbruch's shipment stowed inside when it fell overboard during the ocean voyage (together with 31 other containers of cargo belonging to other shippers).

The arguments introduced for the first time in the moving party's reply affidavit were mostly hearsay, misinformation and irrelevant. Despite the lengthy discussion in the reply affidavit regarding the irrelevant question of insurance, the fact of the matter is that Rosenbruch's shipment was *not* fully insured. In accordance with Rule 56(e) the allegations in the reply affidavit should have all been disregarded by the lower court.

The deviation issue.

When Rosenbruch's freight forwarder, Santini Brothers, filled in the dock receipt and form of bill of lading supplied by the steamship company, it inserted on the face of both the following clause: "Stow under deck only" (29a). While the dock receipt as thus claused was signed and returned immediately to the trucker at the pier as a receipt for the goods, the validated bill of lading was issued to the shipper's agent at an unknown subsequent time. (After the motion a copy of the dock receipt was submitted to the lower court by the steamship company by mail.) However, some time after the bill of lading was submitted to the steamship company for numbering, dating and signature, the under deck stowage clause was blacked out by an unknown employee at an unknown time.

In any event, the steamship company did not indicate on the face of the bill of lading that the shipment was to be stowed *on* deck. Its bill of lading, in clause 7 provides in part "* * * containers may be stowed on deck *unless the bill of lading is claused 'stow under deck' on the face hereof* * * *."

Despite the fact the bill of lading was claused: "Stow under deck only," Rosenbruch's shipment was stowed on the weather deck of the vessel, and the steamship com-

pany charged Rosenbruch the same freight rate as it charged shippers whose goods were stowed in containers under deck. The freight rate was $42.25 per 40 cubic feet of space which the shipment would have displaced if stowed below decks, in accordance with the freight bill attached to Rosenbruch's opposing affidavit as Exhibit 1. The steamship company's tariffs do not provide for varying freight rates depending upon whether the shipment is stowed on deck or under deck.

Since the voyage commenced in January, 1971, it was a winter crossing of the North Atlantic Ocean when heavy weather is common and an expected occurrence. The shipments stowed in the containers under deck arrived safely at the completion of the voyage. Thirty-two of the containers stowed on deck were lost overboard from the deck of the vessel.

POINT I.

It was error for the lower court to disregard the shipper's packages in which the goods were export-packed and to hold instead that the steamship company's own transport equipment was the "package" intended by the Legislature in Section 4(5) of COGSA in 1936.

If there is to be any consistency and coherence in the applicable law the judgment should be reversed. The decision is clearly contrary to the decisions and rationale of all four container cases decided by this Court of Appeals. They are chronologically:

Leathers Best vs. Mormaclynx, 451 F. 2d 800 (2 Cir. 1971);
Royal Typewriter vs. Kulmerland, 483 F. 2d 645 (2 Cir. 1973);

Shinko Boeki vs. U. S. Lines, 507 F. 2d 342 (2 Cir. 1974), and
Cameco vs. U. S. Lines, 1974 AMC 2568 (not officially reported as yet).

In *Leathers Best, Shinko Boeki* and *Cameco,* this court held that a reusable metal container belonging to the steamship company is *not* a package. In both *Leathers Best* and *Shinko Boeki,* the common thrust of this court's sound reasoning was that the carriers' permanent metal containers are "*functionally a part of the ship*" and not a package within the intendment of Section 4(5) of COGSA. Significantly, *Leathers Best* is the only container case considered by this court in which any testimony regarding the function of containers in the context of the containerization program was adduced! The reasoning in *Leathers Best* is epitomized at page 815 in these words:

> "Still we cannot escape the belief that the purpose of Sec. 4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that 'package' is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be 'contained.'"

As indicated herein more fully under the heading "Facts", there is no practical or legal effect in describing or showing the number of containerized packages in the bill of lading form (drawn up by the steamship company to preclude this information). Not only did the steamship company not show actual prejudice; on the contrary, it insists it may delete the number, as Mr. DeOrchis, in his article, 5 J Mar. L. & Comm. (1974) at page 258, put it: "The carrier can reject the shipper's

description (e. g. on a house-to-house bill of lading which specifies receipt of the number of cartons in the sealed container) * * *."

Rather than directly colliding with the unsound *Royal Typewriter* test, in *Shinko Boeki* this court neatly sidestepped the *Royal Typewriter* "functional economics/packaging test," and, instead, simply but astutely noted that carriers' containers were not packages because they were "functionally part of the ship." This, despite the fact the cargo had previously been shipped at times in the shipper's own 55-gallon drums (as well as in the vessels' own deep tanks). The citation of an article critical of *Royal Typewriter* is a good indication of the court's thinking. Since this court aptly held that the carrier's own container-tanks are not packages even when the cargo was not packaged, *à fortiori,* when a shipment has been packed for export, the carrier's container should clearly not be a package.

In the *Cameco* case this court held that the steamship company's 40′ container was not a package despite the fact that it contained a "mixed bag" of packages consisting of cartons and pallets of different sizes and kinds.

The only decision by this court in which a "container" was held to be a package was the *Royal Typewriter* case, in which Judge Tyler also set the stage below. However, on review, this court disagreed with the philosophy and reasoning of Judge Tyler. At the outset, it is important to note that in *Royal Typewriter,* a typical sea container was not involved. It was a unique, small European-type container measured in meters, approximately eight feet long, and was used primarily on the German railroads for inland transportation. It did not belong to nor was it supplied by, the steamship company; it was supplied by the shipper's agent. It was not a typical 40′ container

provided by the steamship company as a necessary adjunct of its container operations: the vessel Kulmerland was not a containership. The "container" did not resemble a regular container in appearance; on the contrary, the testimony was to the effect that the container looked like *general cargo.*

Thus, not only are the facts in the instant case clearly distinguishable from the unique facts in *Royal Typewriter,* but also, the test formulated by the Court of Appeals therein requires a reversal of the instant case. Since the steamship company's attorney in his reply affidavit admitted that the goods were packed for export (44a), the "functional packaging test" set forth in *Royal Typewriter* leaves no alternative.

Appellant could safely stop his brief at this juncture; however, candor requires that it be respectfully suggested herein that the reversal should be based on the correct basic assumption first enunciated in *Leathers Best* and then in *Shinko Boeki,* rather than on the unsound rationale or test fashioned by Judge Oakes in *Royal Typewriter* and reiterated by him with alterations in *Cameco.* Just as Judge Feinberg specifically disagreed with the *Royal Typewriter—Cameco* reasoning in his concurring opinion in *Cameco,* so, the attorney for appellant finds himself, along with the attorney for the steamship company, of the firm opinion that Judge Oakes' *Royal Typewriter* "test" is commercially and legally untenable; at best, it should be confined to the peculiar facts of that case; and, its amorphous reiteration with modifications by Judge Oakes in *Cameco* as *obiter dicta,* should not enhance it.

It is respectfully suggested that it was improvident in the *Royal Typewriter* case, without any testimony regarding the functions, use or economics of containerization

and packaging, to create a "functional economics/packing test" to be applicable *generally* to the entire container concept—based on an *atypical* shipper-provided container for a conventional ship. This is especially so since it entailed the contravention of the objective of an international convention and the statute which implements it, as well as the landmark precedent established by this court in *Leathers Best*.

Curiously, it would seem that Judge Oakes refutes his own test by this apt summary of the objective of Section 4(5) in *Cameco*, 1974 AMC at 2581:

> "To hold in all cases that a container is a package is to defeat the purpose of COGSA, which is to protect shippers from the overreaching of carriers through contracts of adhesion and to provide incentive for careful transport and delivery of cargo."

Contradictorily, underlying the *Royal/Cameco* test is the misapprehension that Section 4(5) was aimed at the *shippers*, rather than the carriers, and to freeze the size and nature of their packaging so that any reduction in size or materials results in the extreme penalty of loss of all but nominal recovery from the negligent carrier. On the other hand, *Royal/Cameco* has no compunction about *increasing* the nature and size of the packaging from a small carton to the carriers' huge metal container.

Under the salutary principle of *stare decisis*, *Leathers Best* should have been followed by Judge Tyler since, basically, the facts are the same: both cases involve goods packed for export in 40′ containers belonging to the steamship company. The decision of Judge Tyler in the instant case reflected his disregard for and complete basic disagreement with the decision of this court in *Leathers*

Best, and was a hasty attempt to reinforce his contrary *Royal Typewriter* decision which was being appealed at the time. Judge Tyler has tried four container cases in all, and in each case has held the metal container a package: 1. *Royal Typewriter;* 2. *Rosenbruch;* 3. *Insurance Co. of N. A. vs. Brooklyn Maru,* 1974 AMC 2443 (not yet officially reported); 4. *Eastman Kodak v. Transmariner,* 1975 AMC 123 (not yet officially reported).

Not only did the lower court disregard *stare decisis,* it clearly contravened both the legislative policy behind Section 4(5) and its specific terms. Before the enactment of Section 4(5) there was no legal impediment to carriers limiting their liability to nominal amounts such as $10 per package. Consequently, Section 4(5) was enacted to prevent this result, i. e., to regulate the carriers and protect the shippers. The language of the entire Section 4(5) makes it clear that the $500 limitation shall apply to each package in which the goods are shipped—not a group of packages. See *Gulf Italia vs. American Export Lines,* 263 F. 2d at 137 (2 CCA-1959).

It is axiomatic that the words of a statute should be construed in their common and ordinary sense. *Malat vs. Riddell,* 383 U. S. 569, 571 (1966). It is clear that the common ordinary meaning of the term "package" is goods packed in a wrapper which becomes an integral part of the package and belongs to the purchaser (or owner) of the package of goods. The term "package" does not ordinarily conjure up a 40′ metal piece of transport equipment belonging to a carrier in which the packages are pre-stowed as a necessary part of the carrier's containership operations to enable it to expeditiously receive, load and discharge large numbers of packages *en masse* mechanically instead of individually by hand. While the metal container must be returned to the steamship com-

pany at the completion of the voyage, true packages are either destroyed on opening or retained by the consignee.

This court, speaking through Judge Kaufman, said in *Crystal vs. Cunard,* 339 F. 2d 295, that it would be against public policy for a carrier by its bill of lading clauses to be able to limit its liability to £-20 ($56) per package in these words: "Furthermore, the £-20 limitation, when contrasted with COGSA's $500 figure, is such an arbitrarily small sum that it should be void as contrary to public policy." Nothwithstanding the foregoing, the lower court in the instant cause saw fit to limit the steamship company's liability to less than $4 a package ($500 divided by 129 packages), in complete disregard of considerations of public policy.

The unsound *Royal Typewriter* test within the context of the entire containerization operation has been the subject of a fuller critical analysis written by this appellant's attorney and published in 5 Journal of Maritime Law & Comm. 507 (1974). Previously the test had been criticized by Mr. M. E. DeOrchis, the attorney for the steamship company and its insurer, in the prior issue of the same publication at page 251. Thus, the *Royal Typewriter* test enjoys the rare distinction of being criticized for publication by knowledgeable practitioners from *all* segments of the shipping industry. Mr. DeOrchis noted the test is commercially unsound, at page 257, this way:

> "One of the economic blessings of containerization is that the expensive packing required for overseas break-bulk shipments can be avoided. *Royal Typewriter*, (the shipper) could have avoided the limitation applied in (the) *Kulmerland* (case) if it had packed its cartons of adding machines in oversease crates or cases and placed those in the container. *Obviously, this would have been an economic waste.*" (Italics and parenthetical words added.)

Indeed, it seems fatuous to determine the function of packaging—not by its function in the mode of transport actually used—but by whether it could have functioned in an obsolete mode of transport in 1960. What is functional clothing for New York is not determined by the weather in Alaska 15 years ago. Packaging, like clothing, must be geared to the environment in which it is used.

This appellant's attorney has written another article applauding the sound reasoning of this court in *Shinko Boeki* and criticizing the *Cameco* rationale. See 6 J. Mar. Law & Comm., page 603 (proof), for July, 1975.

Insurance.

It is unseemly to inject the already discredited "red herring" issue of insurance as the answer to the question: what did Congress mean by the term "package" in Section 4(5). It is not stated precisely how or to what extent insurance is supposed to legally affect the determination of the issues, except to scrap COGSA. The benefits of the statute are not dependent upon insurance. On the contrary, in *Leathers Best* the Court of Appeals succinctly (at p. 815, footnote 18) put it this way: "We must take COGSA as Congress passed it."

COGSA, in 46 U. S. C. 1303 (8), makes it quite clear that a carrier may not benefit from insurance paid for by the shipper, in these words: "A benefit of insurance in favor of a carrier or similar clause shall be deemed to be a clause relieving the carrier from liability" (which is prohibited by the preceding sentence of the statute).

Further, rule 411 of the new Federal Rules of Evidence excludes evidence of liability insurance except for very limited purposes not involved in this litigation.

Declaring the value of the container.

Obviously, since the carrier's equipment is not a package, there is no reason for the shipper to treat it as one and to declare a higher valuation than $500 and pay the enormous extra charges resulting from such a declaration. As the lower court so ably put it in *Leathers Best,* 313 F. Supp. at 1382: "The shipper should not be required to pay an extra charge for protection that COGSA said the carrier must provide."

POINT II.

There is an urgent need for this circuit to uniformly adopt the realistic and sound *Leathers Best* approach to the container concept within the purview of Section 4(5), at least where the steamship company supplies the container.

In this circuit, the issue of what did Congress mean by the term "package" within the purview of Section 4(5) has become so obfuscated by contradictory and confusing judicial opinions (the reasoning of some of which is obfuscated by a multitude of extraneous and false issues), that it is no longer feasible for practitioners to advise their clients with any certainty. It is understandable why the eminent Mr. DeOrchis, in his article referred to *supra,* found it necessary to entitle it: "The Container and the Package Limitation—The Search for Predictability." Mr. DeOrchis' public quest for coherence indicates the predicament which plagues the legal and judicial community alike.

It is a source of great embarrassment that when a client asks a legal opinion regarding the law applicable to containerized cargo, the attorney must advise his client

that litigation is necessary, since the answer will depend upon the personal predilection of the judge in the District Court; and that an appeal will then be necessary, and the ultimate answer will depend upon the personal predilections of the appellate panel.

Those who are knowledgeable about shipping and containerization are well aware of the clear and indisputable difference between the shipper's consumable package of goods and a permanent metal container belonging to or supplied by the steamship company in which the packages are stowed in order to further its containerization operations. It is time for the courts to consistently eschew fantasy, and treat the facts with the same realism as the industry. This circuit has been, to a large extent, the victim of a sort of "conspiracy of silence"; they have been shielded from the complete and true picture of containers in the context of containerization operations. With the exception of *Leathers Best,* not one steamship employee has testified about the function of their containers and their container operations. Without proper background testimony, it is easy for a judge to be misled by mentally picturing a large metal container as simply a box.

At last, the silence has been broken, and the carriers' 1960 container "revolution" has been described by the president of Atlantic Container Line, Ltd. (a consortium of several leading steamship companies engaged solely in container operations). In a talk given to the industry at Philadelphia in October, 1974, and reported in *The Journal of Commerce,* October 18, 1974, he summarized the container concept this way:

> "The real meaning of the container revolution is the fact that with the container the ship was coming to the cargo at the point of origin, wherever

> it was, however many miles from the sea * * * for the first time in history."

This succinct shipowner's explanation demonstrates the soundness of the finding of this court in *Leathers Best:* Containers are not packages, they function as removable cargo holds of the ship brought to the shipper for loading and stowing the packages, leaving the carriers only the rapid transfer of the loaded containers by crane from truck to ship, thus substituting mechanization and mass handling for the costly traditional individual package handling by longshoremen. In promoting their containerization service, the carriers advertise that because of the lessening of the risks of damage by using their containers, the shipper will be able to economize on his packaging costs under this new method of stowing and transporting goods. In addition, carriers give the shipper a 10% reduction in freight charges to compensate him for taking over the carriers' costly stowage burden by pre-stowing his packages in the movable holds for the carriers.

It is respectfully submitted that the grotesque errors contained in the *Royal Typewriter-Cameco* reasoning should not be perpetuated. The steamship company's own movable cargo holds necessary to their containership operations should not be confused with a true package in which the goods are packed and which belongs to the owner of the goods. To hold otherwise in this context would be to deny reality and equity, as well as to frustrate the legislative purpose. The simple recognition of the distinction between unambiguous shipping objects is necessary to get the law back on the right track suggested by *Leathers Best* and *Shinko Boeki*—at least where carrier-supplied containers are involved. Only thus will artificially injected false issues to justify a legal fiction and the resultant uncertainty that requires litigation be obviated.

A three-judge court in *Port Royal Marine vs. Central Gulf Lines, et al.*, 378 F. Supp. 345 (1974), 1974 AMC 1106, recently had the benefit of instructive expert testimony regarding the function of an all-waterborne version of the ordinary container (which may eventually be the subject of a similar claim of "package" to be considered by this court). This metal device is a barge or lighter (lighter aboard ship—or LASH), in which packages are stowed at a shipper's dock upriver, and then the lighter is towed down river for loading on board the ocean-going vessel. The court (at p. 349) referred to them as "small floating cargo holds equipped to be lifted bodily on and off the ship." (Ordinary containers are placed on chassis with wheels for towing by road and/or railway car to the ship.)

The court (pp. 349 and 350) summarized the relevant testimony of an expert naval architect as to their function, thus:

> "The originator of the LASH system is Jerome L. Goldman, a naval architect of New Orleans. He says that the concept originated in his conviction that greater improvements in ship cargo handling and port turn-around were required to increase the efficiency of the maritime trade. According to Mr. Goldman, 'By utilizing LASH lighters from which the cargo was not removed until destination, cargo handling in the LASH system is drastically reduced, and the transfer of cargo from one vessel to another vessel, or transshipment, is eliminated.'"

On December 2, 1972, at Geneva, an International Convention for Safe Containers was held in order to standardize specifications and structural requirements of containers for safety purposes. This Convention was held under the auspices of the United Nations/Intergovernmental Maritime Consultive Organization. It was at-

nded by representatives of 82 countries and a large number of intergovernmental organizations as well as 20 private organizations involved in international shipping. Among the private maritime organizations taking part in the Convention were the following: International Container Bureau, Baltic and International Maritime Conference, International Association of Classification Societies, International Cargo Handling Coordination Association, The International Chamber of Commerce and The International Chamber of Shipping, to name some.

The delegates drafted an illuminating definition of a container in Article 2, as follows:

> "1. *'Container' means an article of transport equipment:*
>
> "(a) of a permanent character and accordingly strong enough to be suitable for repeated use;
>
> "(b) specially designed to facilitate the transport of goods, by one or more modes of transport, without intermediate reloading;
>
> "(c) designed to be secured and/or readily handled, having corner fittings for these purposes;
>
> "(d) of a size such that the area enclosed by the four outer bottom corners is either:
>
> "(i) at least 14 sq.m. (150 sq. ft.) or
>
> "(ii) at least 7 sq.m. (75 sq. ft.) if it is fitted with top corner fittings;
>
> *"the term 'container' includes neither vehicles nor packaging;* however, containers when carried on chassis are included." (Italics added.)

This convention is being submitted to the U. S. Senate in the fall of 1975 for ratification. Thus it is clear that those who are knowledgeable about containers have no doubt but that it is "an article of transport equipment" which functions as a movable hold, and must be constructed and maintained with the same uniform degree of care as the ships themselves.

In addition, a similarly worded definition of a container was agreed upon at an International Customs Convention on Containers. This Customs Convention is an update of a previous Customs Convention ratified by the United States and contained in Volume 20, U. S. Treaties and Other International Agreements, at page 303 *et seq.*

The Customs Convention on Containers, in Chapter 1, Article 1, defined a container as follows:

> "(c) *the term 'container' shall mean an article of transport equipment (lift-van, movable tank or other similar structure):*
>
> "(i) fully or partially enclosed to constitute a compartment intended for containing goods;
>
> "(ii) of a permanent character and accordingly strong enough to be suitable for repeated use;
>
> "(iii) specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;
>
> "(iv) designed for ready handling, particularly when being transferred from one mode of transport to another;
>
> "(v) designed to be easy to fill and to empty; and

> "(vi) having an internal volume of one cubic metre or more; the term 'container' shall include the accessories and equipment of the container, appropriate for the type concerned, provided that such accessories and equipment are carried with the container. *The term 'container' shall not include vehicles, accessories or spare parts of vehicles, or packaging;* * * *." (Italics added.)

See 49 Code of Federal Regulations, Part 420 *et seq.*, where this definition appears in Section 420.3(c) at pages 331 & 332.

Also, see, 46 U.S.C. Section 1122 (pocket supplement), under heading "Amendment," wherein the Merchant Marine Act of 1936 was amended in 1968 to provide for a study of all phases of cargo containers as "a new concept for the carriage of cargo."

An excellent summary of the function and economics of containerization and packaging is contained in the universally accepted findings of the lower court in *Leathers Best*, 313 F. Supp. at 1376:

> "Containers are provided primarily for the convenience of the carrier, since they cut down handling time and can save as much as 90% of the time required for unloading and reloading a vessel. Shippers derived some advantage from the use of containers, in that expensive export packaging can be reduced because there is less handling and reloading, and also in that they protect against damage if loaded properly and, also, against pilferage (unless the whole container is stolen, as took place here)."

POINT III.

The steamship company, by stowing the shipment on deck contrary to the underdeck bill of lading issued by it, is guilty of a deviation, thus depriving it of any package limitation whatsoever.

Notwithstanding the fact Rosenbruch's complaint alleged the facts of the deviation in detail, the steamship company's moving papers ignored this crucial aspect of the litigation except to admit substantially the facts constituting a deviation to wit, on deck stowage despite a "clean" bill of lading.

The bill of lading submitted by the steamship company as Exhibit A in its moving papers indicates on its face that the bill of lading as prepared on behalf of the shipper specifically requested that the container be stowed under deck by means of the clause: "Stow under deck only."

The steamship company's bill of lading, Clause 7, provides in relevant part as follows:

> "Containers may be stowed on deck (unless this bill of lading is claused 'stow under deck' on the face hereof) * * *."

The dock receipt which was immediately signed and returned by the steamship company also contained the "Stow under deck only" clause, and was *not* altered. However, on the bill of lading a line was drawn through the clause "Stow under deck only" at some later date by the carrier. There is no statement on the face of the bill of lading showing that the shipment was to be stowed on deck, contrary to Section 1301(c). It is not known whether the bill of lading clause was struck after

the ship sailed and it was too late for Rosenbruch to do anything about it.

In a similar situation, the Court of Appeals of the Second Circuit in *Encyclopedia Britannica vs. Hong Kong Producer,* 422 F. 2d 7 (2 Cir. 1969), 1969 AMC 1741, page 1757, held:

> "In consequence, the bill of lading must be treated as a clean bill importing below deck stowage. The stowage of the six containers on the weather deck was, therefore, an unreasonable deviation. It is not disputed that the damage to the cargo was caused by sea water to which it was exposed by being stowed on deck. The carrier is liable for the full amount of damages sustained without the benefit of the $500 limitation per package of COGSA. *Jones vs. Flying Clipper,* 1954 AMC 259, 116 F. Supp. 386 (S.D.N.Y., 1953)."

In the instant case, since 32 of the containers that were stowed on deck for the voyage were lost overboard, while all the containers that were stowed under deck arrived safely, it is manifest beyond debate that stowage of the containers on the deck of this ship subjected them to a greater risk than those stowed under deck.

Moreover, since the plaintiff lost his property by reason of stowage of his shipment on deck, while other shippers who paid the same freight rate had their cargo stowed safely under deck, plaintiff was illegally discriminated against in violation of the shipping laws—46 U.S.C. 815 and 46 U.S.C. 1309.

The steamship company may not overrule the firmly entrenched law of deviation and Section 1301(c) of COGSA by means of its tariffs, either on its own or as

a member of a cartel labeled "Conference." COGSA, by its terms, is paramount (Sec. 1303[8]).

COGSA, 46 U.S.C. Section 1304(4), by its terms, indicates that while a deviation to save life or property at sea is reasonable and not an infringement of COGSA or the contract of carriage, deviation for the purpose of *loading cargo* (i. e., for profit) shall, *prima facie*, be regarded as unreasonable. The doctrine of *noscitur a sociis* establishes this construction. Loading cargo on deck is thus *prima facie* an unreasonable deviation. No showing has been made to refute this.

The said decision of the Court of Appeals in *Encyclopedia Britannica, supra*, has been commended and, the decision of this court in *DuPont v. Mormacvega*, 493 F. 2d 97 (1974), to the contrary, has been criticized by an in-depth analysis in a 15-page law review article, 6 *Rutgers-Camden Law Journal* 437, Fall 1974 edition. The article (criticizing DuPont) can be summarized in this sentence at page 449: "The court thus accords the carrier undesirable liberty in unilaterally altering the terms of the contract of carriage."

It is obvious, as the loss of 32 containers in the instant case (as well as the numerous other similar occurrences) testifies, the design or redesign of containerships such as the instant one, is aimed at permitting the carriers to stack as many of their containers as possible on deck—not to protect the cargo.

It is submitted, there is no real difference between the facts herein and in *Encyclopedia Britannica, supra*, except the decks of the instant ship were reinforced to permit greater stacking of containers—four tiers high.

POINT IV.

It is self-contradictory to say, on the one hand, that the steamship company's container is simply a package, while on the other hand, that it, in effect, acts as an extension of the ship itself when stowed on deck.

Clearly, the underlying (albeit tacit) basis for the decision in *DuPont, supra,* that it was not an unreasonable deviation to stow the containerized goods on the deck of the Mormacvega was the fact the metal container acted as an extension of the ship itself. There is no doubt that if the goods in that case were not containerized, on deck stowage would be an unreasonable deviation. Thus, it is clear that there is an inconsistency in holding a container to be simply a package and at the same time an extension of the ship.

CONCLUSION.

The lower court's judgment limiting Rosenbruch's recovery to $500 should be reversed; and, since the parties have agreed to a settlement of the damages between themselves, no further proceedings are necessary at this time.

Respectfully submitted,

GRAHAM & SIMON, P.C.,
Attorneys for Plaintiff-Appellant.

SEYMOUR SIMON,
Of Counsel.

Relevant Parts of Statutes.

***Re:* Package Issue.**

46 U.S.C. Section 1304(5), also referred to as Section 4(5) of the Carriage of Goods by Sea Act (COGSA):

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill or lading. * * * By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. * * *"

46 U.S.C. Section 1303(8):

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act [§§ 1300-1315 of this title], shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

Re: **Deviation Issue.**

46 U.S.C. Section 1304(4):

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act [§§ 1300-1315 of this title] or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

46 U.S.C. Section 1301(c):

> "The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and *cargo which by the contract of carriage is stated as being carried on deck* and is so carried." (Italics added.)

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